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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-46

THE AMERICAN TOBACCO COMPANY,
Petitioner,

v.

JOHN PATTERSON, *et al.*,
Respondents.

AMERICAN BRANDS, INC.,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioners, The American Tobacco Company, a division of American Brands, Inc., and American Brands, Inc. (hereinafter referred to as "American"), respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on February 23, 1976.

Opinions Below

The opinion of the court of appeals is reported at —— F.2d ——, 11 EPD ¶ 10,728 (A1a).* The order of the court of appeals denying the petition for rehearing is unreported (A36a). The first memorandum opinion of the District Court for the Eastern District of Virginia is reported at 8 EPD ¶ 9722 (A38a). The second memorandum opinion of the district court is reported at 9 EPD ¶ 9909 (A85a).

Jurisdiction

The decision of the court of appeals was entered on February 23, 1976. A timely petition for rehearing and suggesting rehearing in banc was denied by order entered April 16, 1976. This petition for a writ of certiorari was filed within 90 days of the entry of that order. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

Questions Presented

These cases offer a unique opportunity for the Court to resolve significant issues regarding the nature of liability, the scope of the back pay remedy, the meaning of the "different locations" exception of Section 703(h) and the power of the Equal Employment Opportunity Commission ("EEOC") to maintain suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (1970), *as amended,* (Supp. III, 1973) ("Title VII"):

1. Where a seniority system has operated to permit all employees to compete equally for promotions for a period well in excess of the statutory period during which a

* References to "A" are to the separate appendix submitted herewith.

charge must be filed, is it permissible to find a violation of Title VII based on statistics showing continuing disproportionate numbers of blacks and females in some job classifications and white males in others?

2. Is an award of "front pay" a permissible remedy under Title VII?

3. Does Section 703(h) of Title VII, as a matter of law, create a presumption that employees of different plants do not fall within the category of "employees who work in different locations" merely because they were hired from the same geographic labor market?

4. Can the EEOC maintain an action where, in violation of Title VII and its own regulations, it failed to give notice of the allegations underlying the action before making a determination of reasonable cause?

Statutory Provisions Involved

The pertinent sections of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (1970), *as amended* (Supp. III, 1973) (Sections 703(a), 703(j), 706(g), 703(h) and 706(b)) and the EEOC's Regulations (29 C.F.R. § 1601.1 *et seq.*) are set forth in the Appendix hereto (A113a).

Statement of the Case

These are Title VII cases, consolidated for trial and appeal, wherein the lower courts held that the seniority systems at two separate plants of American in Richmond, Virginia, were discriminatory. The *Patterson* action* was brought as a class action on behalf of black employees of American. The *EEOC* action was brought by the EEOC on behalf of both blacks and females.

* The *Patterson* action also involved the Civil Rights Act of 1866, 42 U.S.C. § 1981 (1970).

The Virginia Branch (which manufactures cigarettes) and the Richmond Branch (which produces pipe smoking tobacco), are at different physical locations within Richmond, Virginia. The two plants have always had different plant managements, work requirements and personnel needs, and have always had separate hiring facilities and separate seniority systems. A no-transfer rule has been in effect between the plants. There have always been black, white, male and female employees at both plants.

In 1963, racially segregated unions and departmental seniority systems were abolished at both plants and thereafter jobs were awarded within each plant without regard to race. In 1966, male and female job classifications were abolished and all jobs were thereafter equally available to men and women at both plants. Thereafter, jobs were awarded within each plant solely on the basis of plant-wide seniority. The only exceptions were nine jobs out of over 200 at the Virginia Branch and one job at the Richmond Branch for which prior experience in a different job was required, and one job at the Virginia Branch for which prior experience in that job was required. In January, 1968, the latter requirement was eliminated and a posting and bidding procedure replaced the canvassing procedure theretofore used to find the most senior employee desiring to fill a vacancy. At least since January, 1968, American's promotional systems, based on plant-wide seniority, have operated so as to give all employees equal opportunity to compete for promotions.

American contended that the use of plant-wide (employment date) seniority avoided any continuing effects of past discrimination and that because no charge challenging the discarded practices was filed within the requisite period,* the actions were jurisdictionally de-

* The first charge was not filed until January 3, 1969, some 350 days after the implementation of the posting and bidding pro-

(*footnote continued on following page*)

fective and should have been dismissed. Additionally, American contended that the *EEOC* action, insofar as it related to allegations of discrimination against females, should have been dismissed because it was based on a charge filed by a male and American, which was never given notice of the allegations of discrimination against females before the EEOC made its determination of reasonable cause, had no meaningful opportunity to respond to or conciliate those allegations.

The district court found that the "system of posting and bidding adopted in 1968 is fair" (A44a), yet it held that the system needed "further implementation" (*id.*). It concluded that black and female employees had been locked into their jobs, not as a result of current employment practices, but "because of the static condition of the tobacco industry generally, and American in particular, and the advent of automation, both of which have limited opportunities for upward movement of present employees and for new hiring" (A44a-45a).* Notwithstanding that these factors were not employment practices within the meaning of Section 703(a) of Title VII, the district court, "with the full realization that statistics are often misleading" (A43a), nevertheless imposed liability based on "[t]he inference which the Court draws from the statistics overall . . . that . . . there was and is disparate income by race and sex, segregated job classifications by race and sex, and promotional systems based on race and sex" (A44a). Additionally, the district court held that the EEOC had the power to bring suit under the facts of this case, stating that

(*footnote continued from preceding page*)

cedure based on plant-wide seniority and 260 days after the expiration of the 90-day period then in effect for filing a charge (42 U.S.C. § 2000e-5(d) (1970)), which was later amended by increasing the period to 180 days (42 U.S.C. § 2000e-5(e) (Supp. III, 1973)).

* Although discrimination in hiring was an issue at trial in the *EEOC* case, the district court found that there had been no such discrimination.

where an EEOC investigation, based on a charge alleging discrimination against males, uncovers discrimination against females, "[d]iscovery of such discrimination without the ability to seek to alleviate it in accordance with 42 U.S.C. § 2000e-5(f)(1) would subvert the purpose of that provision" (A42a).

The district court ordered that incumbent employees be "bumped" from their jobs to permit black and female employees with greater seniority to occupy their positions, that the plant-wide seniority rosters be merged into a single company-wide seniority roster, and that the requirement of prior experience in another job be eliminated for six of the nine positions as to which that requirement pertained. It also ordered that back pay be awarded in amounts to be determined at a subsequent hearing.

To implement the "bumping" order, the district court entered a detailed decree (A89a) which required, *inter alia*, the posting of job descriptions for all hourly-rated jobs, a tour of each plant for each class member, a viewing of three jobs of his or her choice to which seniority alone would entitle him or her, the selection of one of those jobs, and the awarding of that job or the execution of a court approved "Waiver of Job Selection Opportunity" (A102aa). Pending appeal, the court of appeals stayed the "bumping" order, but only insofar as it required the actual "bumping" of incumbent employees. As required by the district court order, American submitted a report to the district court on the job selection procedure (hereinafter referred to as "the Report"), and filed the Report with the circuit court by a Motion to Supplement Record (A103a).

The court of appeals affirmed the finding of discrimination, although it too recognized the influence of the "static employment in the tobacco industry" (A6a). It relied primarily on statistics as of the time of trial which showed a concentration of blacks and females in some jobs and white males in others (A7a and 23a) and on the fact that

some jobs had never been held by blacks (A8a), some had never been held by females (A23a) and some had never been held by white males (A8a and 23a). Based on these statistics, it assumed without identifying any causal connection, that certain practices must have contributed to such imbalances:

> "Although the company and the union have taken steps in recent years to correct some of the inequalities of the past, the lines of progression, the lack of definite written job descriptions, and barriers to transfer between the branches remain impediments to fair and neutral employment practices. Much must still be done to eradicate any taint of racial discrimination at the plant" (A7a).

By focusing on statistics showing the "taint" of past discrimination, it failed properly to consider evidence showing substantial movement of blacks and females desiring promotions at each plant, and it failed to recognize that the "impediments" had not operated to impede advancement.*

The court of appeals, in reviewing the relief ordered by the district court, limited the provisions requiring the merger of the separate plant seniority rosters to inter-plant

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* Between 1964 and 1974, at the Richmond Branch, where about 50% of the employees were black, 85% of all promotions were filled by blacks; of the desirable packing machine operator positions, 61% were held by blacks in 1973. At the Virginia Branch, where about 17% of the factory employees were black, there had been 363 promotions between January 15, 1968 and the time of trial in 1973, and 51% of those receiving the promotions were black. Of the successful bidders for jobs in the fabrication department at the Virginia Branch, which department had been an all-white department before the elimination of racially segregated job classifications in 1963, 39% were black, and of successful bidders for the desirable automatic machinery operator classification in the fabrication department, 20% were black. From 1964 to 1974, females, who comprise about 43% of the factory employees at the Virginia Branch, received 33% of all promotions and 73% of the promotions to operator of automatic machinery in the fabrication department.

transfers for a narrow sub-class of plaintiffs and reversed the "bumping" order. It expanded the scope of the back pay remedy to include an award for a period beyond the date of judgment to an indefinite time in the future when "the workers are promoted to the jobs their seniority and qualifications merit" (A19a). Over the dissent of Judge Widener, the circuit court affirmed the holding that the EEOC could maintain that portion of its action premised on allegations of discrimination against females, even though the charg had been filed by a male.

Reasons for Granting the Writ

I

The Decision of the Court of Appeals Imposes a "Result-oriented" Standard Under Title VII In Direct Conflict with the "Process-oriented" Standard Adopted by this Court In *Griggs* v. *Duke Power Co.*

These cases present a basic question as to the obligations Title VII imposes upon employers to undo the effects of past discrimination. Once an employer provides a seniority system under which all employees compete equally for promotions as they arise, will the employer nevertheless be liable under Title VII if there rem ns a statistically identifiable concentration of employees by race or sex in various job classifications?* This issue has been stated as follows:

> "Antidiscrimination laws are capable of two basic interpretations. One interpretation—call it process-oriented—emphasizes the purification of the decisional process. The prohibition against discrimination is interpreted as a ban against basing a decision on certain forbidden criteria, for example, an individual's race. A second interpretation—call it result-oriented—emphasizes the achievement of a certain result, improvement of the economic and social position of the protected group. For example, under the result-oriented approach, the obligation imposed by . . . a fair employment law . . . is not to refrain from taking an applicant's race into consideration but rather to eliminate Black unemployment and underemployment." Fiss, *The Fate of An Idea Whose Time Has Come: Antidiscrimination Law in the Second Decade after* Brown v. Board of Education, 41 U. Chi. L. Rev. 742, 764 (1974).

* This assumes as is the fact here that no charge is filed within the statutory period after implementation of a non-discriminatory system. It is a jurisdictional prerequisite that a discriminatory practice must be currently in operation or have been terminated not more than 180 days before the filing of a charge with the EEOC. 42

(*footnote continued on following page*)

This Court in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), resolved this dispute in favor of the process-oriented approach:

> "The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." (401 U.S. at 429-30).

The *Griggs* decision did not construe Title VII to require an employer to eliminate statistical imbalances which might exist in its work force. It did construe Title VII to require that employers must provide "equality of employment opportunities."

(*footnote continued from preceding page*)

U.S.C. § 2000e-5(e) (Supp. III, 1973); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 47 (1974); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 798 (1973). As already noted at 4, the jurisdictionally critical time when the first charge applicable to the instant cases was filed was 90 days, and no charge was filed until almost a year after the posting and bidding system was implemented.

In premising its affirmance of the district court's finding of liability on statistics showing a concentration of blacks and females in certain job classifications and white males in others and on the fact that some jobs had never been held by blacks or females whereas other jobs had never been held by white males, the court of appeals has, in effect, held that Title VII imposes an obligation on employers to achieve racial balance.* Under the decisions below, to have avoided liability under Title VII, American would have had to have disregarded its plant-wide seniority system and reassigned white males, blacks and females to certain job categories based solely on criteria of race and sex. Such conduct would in and of itself violate Title VII and constitute the sort of color and sex-conscious employment decisions explicitly rejected by *Griggs*:

> "In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed." (401 U.S. at 430-31).

This Court has recently reiterated this description of Title VII in *McDonald* v. *Sante Fe Trail Transp. Co.*, —— U.S. —— (1976).

By relying on statistical imbalances, the circuit court ignored the fact that under American's plant-wide seniority systems promotions depended entirely on what vacancies

* Respondents in the *Patterson* action read the court of appeals' decision to require just this sort of racial balancing. In their Brief In Opposition To Application for Stay before this Court, at 3, they said:

> "In this case, moreover, statistics alone would have been sufficient *to prove that petitioner had failed to disestablish its segregated departments;* whether such a segregated system has been effectively abolished must be judged by the changes in the composition of departments which have actually occurred." [Emphasis added.]

were open, the employees' motivation to bid for them and comparative seniority; factors which under any seniority system might well result in statistical balance one year and imbalance another. *Cf. Pasadena City Bd. of Education* v. *Spangler,* —— U.S. —— (1976). The circuit court assumed the existence of "impediments" to the promotion systems without in any way relating the "impediments" to the gross statistics on which it relied.* The fallacy underlying the reliance on statistics showing racial and sexual imbalances and the assumptions based thereon is demonstrated by the fact that even had the bumping procedure ordered by the district court been implemented, the statistics relied on by the court of appeals would not have changed. The Report (A103a) revealed that only 6% (40 of 651) of the class members elected to move from their current positions; only 1% (8 of 651) of the class selected jobs held by white males (the remaining class members who desired to move wanted jobs already held by class members); only 4 of 651 class members wanted to transfer between plants to jobs which would result in the displacement of white males, and only two wanted a job presently held by white males for which prior experience in a different job had been a requirement.

The inevitable result of the decision of the court of appeals is that, to comply with Title VII, employers not only must provide an equal opportunity for all employees to compete but also are required, based solely on race and sex, to redistribute employees within their work force. In

* The problem of dealing with statistics without identifying the causes of those statistics has been observed in a similar context:

> "But dramatic and frustrating though it may be, this discrepancy does not prove a violation of the Civil Rights Acts, as plaintiffs contend. It does not evidence that the defendants maintained practices or procedures which caused the statistical discrepancy. And most importantly, it gives no clue as to where the problem of disparate treatment might lie." *Harper* v. *Mayor and City Council of Baltimore,* 359 F. Supp. 1187, 1193 (D. Md.), *aff'd sub nom. Harper* v. *Kloster,* 486 F. 2d 1134 (4th Cir. 1973). [Footnote omitted.]

essence, therefore, the decision converts a statute the purpose of which is the creation of a process for equal employment opportunity into a statute mandating employment decisions based solely on considerations of race and sex. This new interpretation of Title VII is in direct conflict with this Court's decision in *Griggs*. Because of its obvious national import, the decision below should be reviewed and reversed by this Court.

II

The Award of "Front Pay" Is In Direct Conflict with Decisions of the Fifth and Sixth Circuits and the Universally Adopted "Rightful Place" Interpretation of Title VII

The Fourth Circuit, in its opinion below, ordered the payment of back pay prospectively beyond the date of judgment until some indefinite point in the future—*i.e.*, "front pay":

> ". . . back pay must be allowed an employee from the time he is unlawfully denied a promotion, subject to the applicable statute of limitations, until he actually receives it." (A 18a).

This decision is in direct conflict with decisions in the Fifth and Sixth Circuits which have held that, consistent with the "rightful place" interpretation of Title VII, back pay should terminate on or before the date of judgment. *Sabala* v. *Western Gillette, Inc.*, 516 F.2d 1251, 1265-66 (5th Cir. 1975); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211, 258 (5th Cir. 1974); *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1379 (5th Cir. 1974); *Meadows* v. *Ford Motor Co.*, 510 F.2d 939, 948 (6th Cir. 1975); *Head* v. *Timken Roller Bearing Co.*, 486 F.2d 870, 876-78 (6th Cir. 1973). *See also Satty* v. *Nashville Gas Co.*, 522 F.2d 850, 855 (6th Cir. 1975).

In *Sabala, supra*, decided after this Court's opinion in *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975), plaintiffs had appealed the district court's order that back pay continue only until the date of judgment, arguing that the award should not terminate until the affected employees attained the positions which they would have had but for the employer's discriminatory practices. In rejecting plaintiffs' contention, Judge Wisdom, who had authored the landmark "rightful place" opinion of *Local 189, United Papermakers and Paperworkers, AFL-CIO* v. *United States*, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970), reaffirmed the Fifth Circuit's consistent position that back pay must terminate, at the latest, on the date of judgment:

> "In *Pettway*, the court ordered injunctive relief to aid the discriminatees in gaining and maintaining their rightful place. 494 F.2d 211, 248. Although we ordered the district court to require the company to take affirmative steps to insure that the discriminatees be given their rightful place, we did not require the district court to award back pay to the date they would actually take their rightful place. 'The termination date of the back pay period for most claimants will be the date of the *district court's decree implementing our decision*, but may, depending on the employee's situation, be [earlier on] March 31, 1971, the date testing was ended.' 494 F.2d 211, 258 (emphasis added)." (516 F.2d at 1266).*

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* The two decisions relied on by the Fourth Circuit in its opinion here were opinions of *district courts* in the Fifth Circuit which are in direct conflict with the Fifth Circuit's position on back pay. *Bush* v. *Lone Star Steel Co.*, 373 F. Supp. 526 (E.D. Tex. 1974), was not appealed and hence never ruled on by the Fifth Circuit, *United States* v. *United States Steel Corp.*, 371 F. Supp. 1045 (N.D. Ala. 1973), was appealed on other issues (520 F.2d 1043 (5th Cir. 1975)) and the termination date specified in the district court's

(*footnote continued on following page*)

In *Local 189, supra,* Judge Wisdom set forth the theory of liability and relief which has been universally adopted as the proper interpretation of Title VII:

> "A *'rightful place'* theory stands between a complete purge of 'but-for' effects [and] maintenance of the status quo. The Act should be construed to prohibit the *future awarding* of vacant jobs on the basis of a seniority system that 'locks in' prior racial classification." (416 F.2d 988) [Emphasis in original.] [Footnote omitted.]

Under the "rightful place" theory, a court will enjoin those practices that have "locked in" the affected employees, thereby placing them in a position to bid on an equal basis for vacancies in higher paying jobs as they arise; however, affected employees do not get immediate promotion, but rather are given "the first opportunity to move into the next vacancies in positions which they would have occupied but for wrongful discrimination and which they are qualified to fill." *United States* v. *Georgia Power Co.,* 474 F.2d 906, 927 (5th Cir. 1973). They are slotted into the seniority system in the position they would have been absent discrimination. *Franks* v. *Bowman Transp. Co.,* 96 S. Ct. 1251, 1264-65 (1976).

In the "rightful place" cases, the date of judgment has been selected as the cut-off date for back pay awards because it is from that date that the unlawful employment

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(footnote continued from preceding page)

opinion would appear to have been overruled by the Fifth Circuit's instructions to the district court as to the scope of the back pay remedy:

> "After consulting *Pettway, supra,* 494 F.2d at 258, with regard to Alabama limitations, the beginning date, and the *closing date of the back pay period,* the district court, with the assistance of the parties, should strive to the fullest practicable degree to award back pay by reconstructing hypothetically each eligible claimant's work history." (520 F.2d at 1055). [Emphasis added.]

practice is eliminated allowing all employees thenceforth to compete equally. The cut-off date can be even earlier where the discriminatory practice was earlier terminated by voluntary action of the employer, as in *Head* v. *Timken Roller Bearing Co., supra,* at 878. Under the "rightful place" theory, in the same manner that Title VII requires that all employees be given equality of opportunity to compete for job opportunities as they arise, but not the right to immediate placement in the job to which their seniority alone might entitle them, back pay applies only to that period during which the employees were impeded by a discriminatory practice and does not apply prospectively.

The courts adopting the "rightful place" theory and terminating back pay as of the date of judgment were well aware of the requirement, recently confirmed by this Court in *Moody, supra,* of "making persons whole for injuries suffered through past discrimination" (422 U.S. at 421):

> "The remedies authorized in Title VII specifically include back pay. As indicated above, the purpose of Title VII is to make the discriminatee whole and eliminate the effects of past discrimination as far as possible. Where the discriminatee has suffered economic injury in the form of lost wages, back pay is normally appropriate relief." *Franks* v. *Bowman Transportation Co.,* 495 F.2d 398, 421 (5th Cir. 1974), *rev'd on other grounds,* 96 S.Ct. 1251 (1976).

Accord, Meadows v. *Ford Motor Co., supra* at 948.

Given the importance of the back pay remedy under Title VII, its scope should not vary from court to court. The conflict between the Fourth Circuit and the Fifth and Sixth Circuits is now clearly defined and this critical issue ought to be resolved by this Court.

III

The Court of Appeals Erroneously Interpreted the "Different Locations" Language of Section 703(h)

In *Russell* v. *American Tobacco Co.*, 528 F. 2d 357 (4th Cir. 1975), *cert. denied*, —— U.S. —— (1976), the Fourth Circuit first set forth its "labor market" rule under which the "different locations" language of Section 703(h) of Title VII* is interpreted to create a presumption that employees drawn from the same labor market do not work at different locations. In the instant case, the court of appeals stated the rule as follows:

> ". . . the labor market is the most important factor in determining whether a company's employees work in different locations. A company operating two or more of its plants with employees who are from the same geographic area and who are unskilled or possess the same skills *can assign* an applicant to an entry level position in either plant. Therefore, employees the company hired from the same labor market would not generally fall within the statutory class of 'employees who work in different locations.'" (A12a) [Emphasis added.]

Here, in reliance on its "labor market" rule, the Fourth Circuit, without any finding that American actually assigned employees to one or the other of its plants, imposed

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* Section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h) (1970), provides in pertinent part:

> "Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment . . . to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin. . . ."

inter-plant transfer relief as if there had been actual assignment and as if such assignment had been done with intent to discriminate.

The Fourth Circuit makes the initial presumption that employees drawn from a common labor market do not work at different locations even though they work at different plants. It further presumes that an employer *could* have assigned employees to one or the other of those plants and that therefore it *did* in fact so assign employees. Finally, based on these presumptions, it further presumes that such assignment was with an intent to discriminate.

Against the facts of this case, where each plant maintained independent hiring offices, made different products and hired at different times, where there was no evidence that blacks or females had ever been excluded from either plant or assigned to one plant or the other, and where the district court found that there had been no discrimination in hiring, it becomes clear that the Fourth Circuit has read the "different locations" exception out of Title VII. Every employer who by geographic accident operates more than one plant within a labor market will now be faced with potential liabilities of serious proportions even though the plants involved are wholly independent and manufacture different products. Section 703(h) is not intended to place such a burden on employers and on its face is intended to bring the opposite result.

Such an important question of interpretation should be reviewed and settled by this Court.

IV

In Permitting the EEOC to Maintain Suit Without Giving American Adequate Notice of the Allegations Against It, the Court of Appeals Has Rendered Meaningless the Procedural Safeguards of Title VII and the EEOC's Regulations

In permitting the EEOC to maintain suit alleging discrimination against women where no charge bearing such allegations was ever filed by or on behalf of an aggrieved employee, the Fourth Circuit permitted the EEOC to violate the procedural safeguards given to employers under Title VII and the regulations promulgated thereunder by the EEOC itself.

This Court has made it clear on numerous occasions that it will not tolerate a governmental body's failure to follow its statutory mandate and its own regulations. *See, e.g., Yellin* v. *United States,* 374 U.S. 109 (1963); *Vitarelli* v. *Seaton,* 359 U.S. 535 (1959); *Accardi* v. *Shaughnessy,* 347 U.S. 260 (1954). The proper sanction when such violations occur is the dismissal of the action. *Yellin* v. *United States, supra; EEOC* v. *Hickey-Mitchell Co.,* 507 F. 2d 944 (8th Cir. 1974). In *Yellin,* this Court, reversing a conviction for contempt of Congress because the House Committee on Un-American Activities had failed to follow its own rules, stated:

> "But [Yellin] is at least entitled to have the Committee follow its rules and give him consideration according to the standards it has adopted. . . ." (374 U.S. at 121).

The Court of Appeals for the Eighth Circuit applied this concept to the EEOC's failure to follow its own regulations and the Fourth Circuit is in direct conflict with that position. In *EEOC* v. *Hickey-Mitchell Co., supra,* the EEOC failed to comply with its regulation, 29 C.F.R. § 1601.23, requiring that it notify the employer

of the failure of conciliation attempts and the termination thereof unless the employer asked to reopen conciliation discussions. The Eighth Circuit held that the EEOC's failure to follow the conciliation procedure to its final conclusion as provided in its regulations warranted dismissal of the action, even where the employer had expressly stated that it did not want to conciliate. It reasoned:

> "Compliance with the regulation, a last gesture by the Commission of a conciliatory attitude, may well give pause to the most (theretofore) recalcitrant employer, now indubitably faced with expensive and time-consuming litigation, and thus lead to a resolution of these disputes in the congressionally preferred forum." 507 F.2d at 949.

In the instant case, the violations were more numerous and more flagrantly in disregard of procedural rights and the conciliation mandate of Title VII than was the violation in *Hickey-Mitchell.* No charge was ever filed containing allegations relating to American's employment practices with respect to females* as required by Section 706(b) and 29 C.F.R. § 1601.11(a)(3) (1975).** At no time before the determination of reasonable cause was American given any notice, as required by Section 706(b) and 29 C.F.R. § 1601.13 (1972), specifying the "circumstances of the alleged unlawful employment practice." (Section 706(b)). As a result, American was deprived of any opportunity to present evidence or its position with respect to those circumstances as provided by 29 C.F.R. § 1601.14 (1972). The EEOC also failed to give American an oppor-

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* Absent such a charge by a female, any member of the EEOC could have filed such a charge pursuant to Section 706(b) and 29 C.F.R. § 1601.10 (1975).

** In all instances, citation is to the provision of 29 C.F.R. § 1601.1 *et seq.* in effect during the period of the EEOC investigation.

tunity to utilize the predecision conciliation procedure set forth in 29 C.F.R. § 1601.19c (1972) with respect to the allegations of female sex discrimination. Nor was American given an opportunity to file exceptions to findings of fact as to discrimination against females as then required by 29 C.F.R. § 1601.19b(a) (1972). The EEOC's investigation required by Section 706(b) and 29 C.F.R. § 1601.14 (1972), was thus incomplete and inadequate as to the allegations relating to females and, in turn, rendered unreasonable the "determination of reasonable cause" required by Section 706(b) and 29 C.F.R. § 1601.19d(a) (1972). The conciliation required by Section 706(b) became meaningless as to those allegations because American was caught by surprise, not having had any notice thereof until the determination of reasonable cause had already been made, when it was too late to influence that determination. As Judge Widener recognized in his dissent in *EEOC* v. *General Electric Co.*, 532 F. 2d 359 (4th Cir. 1976):

> "There are no administrative 'settlement discussions' once a finding of reasonable cause has been made, conciliation after that time going only to remedy." (532 F.2d at 375).

Finally, the EEOC failed to send American the notice required by 29 C.F.R. § 1601.23 (1975) that conciliation was terminated unless American wished to reopen discussions; the failure to send this notice was the precise basis upon which the court in *Hickey-Mitchell, supra,* dismissed the EEOC complaint.

In permitting the EEOC to maintain suit notwithstanding all these violations, the court of appeals relied upon its decision in *EEOC* v. *General Electric Co., supra,* without stating more. In *General Electric,* the Fourth Circuit deliberately chose to place administrative expediency over adherence to the procedural safeguards of Title VII and the EEOC's own regulations. In so doing, it acted in flagrant disregard of Congressional intent, as expressed

in the legislative history to the 1972 amendments to Title VII, emphasizing that the procedural safeguards were "included in the bill to insure that fairness and due process are part of the enforcement scheme." (S. Rep. No. 92-415, 92d Cong., 1st Sess. 25 (1971)).

The court of appeals also erroneously reasoned in *General Electric* that even if conciliation was rendered somewhat ineffectual by new allegations raised when the employer could no longer present its position in an attempt to preclude a reasonable cause determination, it was merely a technical violation because the employer could always defend its position in court. Such reasoning is contrary to this Court's recognition that "[c]ooperation and voluntary compliance were selected as the preferred means for achieving [equality of employment opportunities]," *Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36, 44 (1974). As the Eighth Circuit observed in *Hickey-Mitchell, supra,* "[i]n view of the central role of conciliation in the scheme of Title VII we cannot say the regulation is merely 'technical.' " (507 F.2d at 948). The Fourth Circuit's position is also contrary to this Court's reasoning in *Yellin* and *Accardi, supra,* that dismissal was called for notwithstanding the recognition that petitioner might well have lost even had proper procedure been followed.

The Fourth Circuit is in direct conflict with this Court and the Eighth Circuit on the critical issue of the necessity of the EEOC to follow the provisions of Title VII and its own regulations. Accordingly, this decision of the Fourth Circuit should be reviewed and reversed.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the opinion and judgment of the Fourth Circuit.

Respectfully submitted,

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